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No. 14-280

IN THE

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE AND THE CRIMINAL JUSTICE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*

The Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) at Harvard Law School continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. The Charles Hamilton Houston Institute marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers. The Institute has been focused on, among other things, reforming unduly harsh criminal justice policies and redressing the influence of race on sentencing outcomes.

The Criminal Justice Institute at Harvard Law School pursues various criminal justice initiatives and engages in broader public education, research, practice, and policy on topics including the need to eliminate excessive punishments.

SUMMARY OF ARGUMENT

The parties disagree about whether *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which precludes mandatory juvenile life without parole, has retroactive effect. The invited *amicus curiae* brief

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief.

suggests that this Court lacks jurisdiction to decide the *Miller* retroactivity issue at all.

A more straightforward way to resolve the case would be to answer the question this Court has explicitly left open: whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles." *Miller*, 132 S. Ct. at 2469. Nine states have abandoned juvenile life without parole in the three short years since *Miller*. Resort to the punishment has become exceedingly rare even in the jurisdictions that formally retain the sanction. In light of these developments, *Amici* urge the Court to request supplemental briefing on the question of whether imposing a life without parole sentence upon a juvenile violates the Eighth Amendment's ban on cruel and unusual punishments.[2]

ARGUMENT

I. NATIONAL STANDARDS OF DECENCY DO NOT TOLERATE DEATH-IN-PRISON SENTENCES FOR JUVENILES

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. Amend. VIII. The "standard of extreme cruelty" proscribed by the Eighth Amendment holds constant across generations; yet, "its applicability must change as the basic mores of society change." *Kennedy v.*

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[2] There is at least one Petition before the Court that squarely raises this question. *See Jacobs v. Louisiana*, 15-5004. *Davis v. Michigan*, 14-8106, is another case in which the Court could address this question.

Louisiana, 554 U.S. 417, 419 (2008), quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting); *Obergefell v. Hodges*, 576 U.S. _ (2015) (slip op., at 11) ("The nature of injustice is that we may not always see it in our own times").

The Court consults various indicia of democratic deliberation to assess whether a challenged punishment practice comports with contemporary societal norms. These indicia include legislative enactments and actual sentencing practices. *See e.g. Graham v. Florida*, 560 U.S. 48 (2010), as well as other, broader factors. *See e.g. Obergefell*, 576 U.S. at _ (2015) (slip op., at 23) (considering, for example, "referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings").

Legislative Enactments. The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). "It is not so much the number of these States that is significant, but the consistency of the direction of change." *Id.* at 315.

Fifteen states (and the District of Columbia[3]) prohibit juvenile life without parole sentences. Prior to *Miller*, six states barred the punishment—

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[3] *See* The Sentencing Project, *Slow to Act: State to 2012 Supreme Court Mandate on Life Without Parole* (2014) *available at* http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf.

Alaska,[4] Colorado,[5] Kansas,[6] Kentucky,[7] Montana,[8] and Oregon.[9] Following *Miller*, an additional nine states abolished juvenile life without parole. Connecticut,[10] Hawaii,[11] Nevada,[12] Texas,[13]

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[4] Alaska Stat. § 12.55.125.

[5] Colo. Rev. Stat. §§ 17-22.5-104(IV), 18-1.3-401(4)(b)(I).

[6] Kan. Stat. Ann. § 21-6618.

[7] Ky. Rev. Stat. 640.040(1).

[8] Mont. Code Ann. §§ 46-18-222, 45-5-102(2).

[9] Or. Rev. Stat. Ann. § 161.620.

[10] S.B. 796, Jan. Sess. (Conn. 2015), *amending* Conn. Gen. Stat. §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a). Connecticut eliminated JLWOP in 2015. Under the new statute, the most serious offense for juveniles is murder, which carries a minimum sentence of 25 years (with parole eligibility after 15 years) and a maximum sentence of 60 years (with parole eligibility after 30 years). *See id.* § 1 (juveniles eligible for parole after serving 12 years or 60% of the sentence, whichever is greater; those sentenced to more than 50 years eligible after 30 years); *id.* §§ 7 & 8 (only those 18 or older may be convicted of murder with special circumstances and arson murder); *id.* § 9 (murder is a class A felony); *see also* Conn. Gen. Stat. § 53a-35a (class A felonies punishable by a minimum of 25 years and a maximum of 60 years).

[11] H.B. 2116, 27th Leg. Sess. (Haw. 2014), *amending* Haw. Rev. Stat. §§ 706-656(1), -657 (2014). Hawaii eliminated JLWOP in 2014. Under the new statute, juveniles convicted of first-degree murder or attempted first-degree murder are sentenced to life with the possibility of parole. Haw. Rev. Stat. § 706-656(1). After an initial hearing with the child, the parole board formulates a rehabilitation plan and sets the parole eligibility date. *Id.* § 706-669(1).

[12] A.B. 267, 78th Reg. Sess. (Nev. 2015), *enacting* Nev. Rev. Stat. §§ 176, 176.025, 213, 213.107. Nevada eliminated

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Vermont,[14] West Virginia,[15] and Wyoming[16] abolished juvenile life without parole ("JLWOP") by statute. Massachusetts abolished by court ruling.[17] Delaware retained the punishment semantically, but

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JLWOP in 2015. The new maximum sentence available for juveniles is life with the possibility of parole. *Id.* § 2.

[13] S.B. 2, 83rd Leg. Special Sess. (Texas 2013), *enacting* Tex. Penal Code Ann. § 12.31, Tex. Code Crim. Proc. Ann. art. 37.071. Texas eliminated JLWOP for 17-year-olds in 2013. Texas had eliminated JLWOP for those 16 and younger in 2009. S.B. 839, 81st Leg. Sess. (Texas 2009), *enacting* Tex. Gov't Code Ann. § 508.145(b). Under these statutes, juveniles convicted of capital felony are subject to life sentences with parole eligibility after 40 years. Tex. Penal Code Ann. §§ 12.31(a); Tex. Gov't Code Ann. § 508.145(b).

[14] H. 62, 73rd Sess. (2015), *enacting* Vt. Stat. Ann. tit. 13, § 7045 (2015). Vermont eliminated JLWOP in 2015.

[15] H.B. 4210, 81 Leg., 2d Sess. (W.V. 2014), *enacting* W. Va. Code §§ 61-2-2, -14a, 62-3-15, -22, -23, 62-12-13b. West Virginia eliminated JLWOP in 2014. Under the new statute, juveniles convicted of first-degree murder become parole eligible after serving 15 years. W. Va. Code §§ 61-2-2, 61-11-23.

[16] H.B. 23, 62nd Leg., Gen. Sess. (Wy. 2013), *enacting* Wyo. Stat. Ann. §§ 6-2-101, 6-2-306, 6-10-201, 6-10-301, 7-13-402). Wyoming eliminated JLWOP in 2013. Under the new statute, juveniles convicted of first-degree murder receive a life sentence with parole eligibility after 25 years. Wyo. Stat. Ann. §§ 6-2-101(b), 6-10-301(c).

[17] *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (2013). In 2013, the Massachusetts Supreme Judicial Court held that JLWOP sentences violate the state constitution. *Id.* In 2014, the state enacted legislation that provides that 14-17 year olds convicted of first-degree murder become eligible for parole after 20-30 years, depending on certain circumstances relating to the offense. Mass. Gen. Laws ch. 265, § 2(b); *id.* ch. 279, § 24.

it now provides every individual serving a JLWOP sentence the opportunity to petition for a sentence reduction after the sentence is initially imposed.[18] In each of these states, then, *every* juvenile who redeems himself or herself in prison has a meaningful opportunity to demonstrate to a parole board or judge that he has rehabilitated himself and that he should be released.

The speed and consistency with which the states have abandoned juvenile life without parole—nine states in three years—is extraordinary. Preceding *Atkins*, sixteen states in thirteen years had barred the death penalty for intellectually disabled offenders. 536 U.S. at 307, 314. In the fifteen years leading up to *Roper v. Simmons*, 543 U.S. 551, 565-67 (2005), only five states had abolished the death penalty for juvenile offenders.[19] In the three years since *Miller* an average of three

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[18] S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013), *amending* Del. Code Ann. tit. 11, §§ 4209, 4209-A, 4209-217(f), 3901(d). Delaware eliminated JLWOP in 2013. Under the new statute, all juveniles sentenced to more than 20 years, including those sentenced to JLWOP, may petition the sentencing court for a sentence modification. These modification requests may be filed after 30 years in first-degree murder cases and after 20 years in all other cases. Inmates may receive subsequent reviews every five years. Del. Code Ann. tit. 11, § 4204A(d)(1).

[19] In addition to the nine states, enumerated *infra*, that have abolished JLWOP since *Miller*, prior to *Miller*, dating back a decade: Kansas abolished JLWOP in 2011, Montana did so in 2007, and Colorado did so in 2006. *See* Kan. Stat. Ann. § 21-6618 (2011), *repealing* § 21-4622; S.B. 547, 60th Leg. (Mont. 2007); Colo. Rev. Stat. § 18-1.3-401(4)(b)(I) (2006) *amending* § 18.1-3-401(4) (2002).

states per year have repudiated juvenile life without parole. Moreover, the uninterrupted trend away from death-in-prison sentences for juveniles now includes 12 states over the last 10 years.[20]

How the punishment is used in practice. In addition to legislative enactments, "actual sentencing practices are an important part of the Court's inquiry into consensus." *Graham*, 560 U.S. at 62. In *Graham*, Florida argued that there could be "no national consensus against the sentencing practice at issue," because "thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile non-homicide offender in some circumstances." Justice Kennedy, writing for the Court, labeled the State's argument "incomplete and unavailing," and proceeded to identify a consensus against the punishment practice based on the infrequency of its use. 560 U.S. 48, 64 (2010).

In addition to the fifteen states that have formally abandoned juvenile life without parole, at least thirteen additional states have functionally

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[20] In the context of capital punishment for the intellectually disabled and juveniles respectively, *Atkins* and *Simmons* relied on the direction of the trend away from the punishment practice to overrule prior precedent. *See Penry v. Lynaugh*, 492 U.S. 302 (1989) (rejecting a claim that the execution of an intellectually disabled offender would violate then-existing standards of decency); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (rejecting a claim that the execution of a juvenile offender over the age of 15 would violate then-existing standards of decency). By contrast, *Miller* expressly left open the question of whether the 8th Amendment categorically bars juvenile life without parole. 132 S. Ct. at 2469.

abandoned the punishment. It appears that zero individuals are serving a JLWOP sentence in six states: Indiana, Maine, New Jersey, New Mexico, New York, and Rhode Island.[21] In seven additional states—Idaho, New Hampshire, North Dakota, Ohio, South Dakota, Utah and Wisconsin—there appears to be five or fewer juveniles serving life without parole.[22] Considering that individuals serving JLWOP often live in prison for decades, the presence of a mere handful of inmates in a state under a death in prison sentence reflects the practical obsolescence of the punishment.[23]

Even counting these 28 states that have abolished JLWOP in law or practice understates the consensus against its use. First, in states where *Miller* has been given retroactive effect, trial courts reconsidering the appropriateness of juvenile life without parole have mostly eschewed the

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[21] According to information provided by state Departments of Corrections and attorneys familiar with JLWOP in each jurisdiction. *See Juvenile Life Without Parole After* Miller v. Alabama, A Report of the Phillips Black Project. *See Juvenile Life Without Parole After* Miller v. Alabama, A Report of the Phillips Black Project at 35, 44, 65, 68, and 79 (July 2015).

[22] According to information provided by the respective state Departments of Corrections. *See Juvenile Life Without Parole After* Miller v. Alabama, A Report of the Phillips Black Project at 31, 63, 70, 71, 82, 89, 97 (July 2015).

[23] As the Court explained in *Graham*, "[i]t becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades." *Graham v. Florida*, 560 U.S. 48, 65 (2010).

punishment.[24] Second, other states—including California and Florida—have abolished JLWOP except for a small subset of unusually aggravated first-degree murder cases.[25] Prior to *Miller*, California and Florida were two of the nation's most frequent users of JLWOP sentences.[26] Now both states have all but eliminated the punishment. Three additional states have significantly narrowed their use of JLWOP post-*Miller*. In North Carolina, JLWOP is no longer available for those convicted under the felony murder doctrine.[27] Pennsylvania,

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[24] *See e.g.* Mississippi State Public Defender, Office of Capital Defense Counsel, *Monthly Activities Report for June 2015*, pp. 8-9, *available at* http://www.ospd.ms.gov/CDForms/Capital%20Defense%20Monthly%20Report%20June%202015.pdf (showing that, in the aftermath of a retroactivity ruling from the Mississippi Supreme Court, more than 80% of the cases that have been resolved have ended in a sentence less than JLWOP).

[25] *See e.g.* Cal. Penal Code § 1170(d)(2)(A)(i), (ii) (limiting juvenile life without parole to homicides involving torture and / or the killing of a public safety official); Fla. Stat. §§921.1402, 775.082 (juvenile life without parole is available only for juveniles who commit capital murder after having previously been convicted of an enumerated violent felony).

[26] Prior to *Miller*, the five states that imposed JLWOP sentences most frequently were Pennsylvania, Michigan, Louisiana, Florida and California. *See* Human Rights Watch, *State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life Without Parole*, http://www.hrw.org/sites/default/files/related_material/updatedJLWOP10.09_final.pdf.

[27] S.B. 635, 2011 Gen. Assemb. Reg. Sess. (N.C. 2012), *enacting* N.C. Gen. Stat. §§ 15A-1340.19A, 15A-1340.19B, 15A-1340.19C (2012). Under North Carolina's 2012 statute, all juveniles convicted of first-degree murder under the felony murder doctrine become eligible for parole after 25 years. N.C.

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which once imposed mandatory JLWOP for first- and second-degree murder, eliminated JLWOP as punishment for second-degree murder.[28] Washington abolished JLWOP for defendants younger than 16.[29]

Finally, this movement away from juvenile life without parole fits into a broader national reconsideration of the harshness of juvenile sentencing. For example, in 2014, the Iowa Supreme Court held on state constitutional grounds that "juvenile offenders cannot be mandatorily sentenced under a mandatory minimum sentencing scheme."

Gen. Stat. Ann. §§ 15A-1340.19B(a)(1), 15A-1340.19A (2014). In other first-degree murder cases, judges have discretion to impose either life with parole eligibility after 25 years or JLWOP. *Id.* §§ 15A-1340.19B(a)(2), 15A-1340.19A.

[28] S.B. 850, 2011 Gen. Assemb. Reg. Sess. (Pa. 2012), *enacting* Pa. Cons. Stat. §§ 1102, 1102.1, 9122, 9123, 9401, 9402, 6301, 6302, 6303, 6307, 6336, 9711.1, 9714, 6139. Prior to Pennsylvania's 2012 statute, JLWOP was a mandatory sentence in second-degree murder cases. *See* 18 Pa. Cons. Stat. § 1102(b) (2011). Now juveniles become parole eligible in second-degree murder cases after 20-30 years, depending on their age at the time of the offense. 18 Pa. Cons. Stat. § 1102.1(c) (2012). JLWOP is no longer a possible sentence in those cases. *Id.*

[29] S.B. 5064, 63d Leg., 2013 Reg. Sess. (Wash. 2014), *amending* Wash. Rev. Code §§ 9.94A.510, -.540, -.6332, -.729, 9.95.425, -.430, -.435, -.440, 10.95.030. Under Washington's 2014 statute, for all offenses other than aggravated first-degree murder, juveniles are eligible for parole after serving no more than 20 years. Wash. Rev. Code § 9.94A.730(1). In aggravated first-degree murder cases, juveniles 15 and under receive life sentences with parole eligibility after 25 years; 16 and 17 year olds may be sentenced to either life sentences with parole eligibility after no less than 25 years or JLWOP. *Id.* § 10.95.030(3)(a)(i), (ii).

State v. Lyle, 854 N.W.2d 378, 400-04 (Iowa 2014). Several states enacted post-*Miller* reforms requiring courts to consider the diminished culpability of juveniles before sentencing a juvenile offender in adult court. *See e.g.* S.B. 796, Jan. Sess, Sec. 2 (Conn. 2015). Other states have begun to consider the more sweeping question of whether too many juveniles are being tried in "adult" court. *See e.g.* H.B. 1271, 68th Gen. Assemb., 2d Sess. (Colo 2012).

The degree of geographic isolation reflected in the punishment. In *Graham*, the Court found that the extreme geographic concentration of the states that imposed juvenile life without parole for non-homicide offenses bolstered the argument that JLWOP does not accord with contemporary standards of decency. There, Florida alone accounted for the majority of JLWOP sentences. And only 10 states had anyone serving a JLWOP sentence. *Graham*, 560 U.S. at 64. Prior to *Miller*, about 64% of the estimated 2500 JLWOP sentences nationwide came from just five states: Pennsylvania, Louisiana, Michigan, California, and Florida.[30] As discussed above, California and Florida have now eliminated JLWOP as a possible punishment for all but a fraction of aggravated first-degree murders, and those new laws apply retroactively.[31] This only

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[30] *See* Human Rights Watch, *State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life Without Parole* (2004), *available at* http://www.hrw.org/sites/default/files/related_material/updatedJLWOP10.09_final.pdf.

[31] California's post-*Miller* statute is explicitly retroactive. Cal. Penal Code § 1170(d)(2)(J). While Florida's statute is not explicitly retroactive, when the Florida Supreme Court held *Miller* retroactive, it directed that the sentencing

– footnote con'td –

further underscores Pennsylvania, Louisiana and Michigan's outlier status. Those three states represent less than 9% of the American population, but they dominate the nation's relationship with JLWOP [32]

In sum, there is now a robust consensus against the use of juvenile life without parole. Most states have abandoned the sanction in law or practice, and the jurisdictions that continue to use it appear to be doing so less frequently. Moreover, the jurisdictions that inflict juvenile life without parole have become increasingly isolated geographically—a fact that further reflects that those jurisdictions are out of step with the norms of the Nation.

II. LIFE WITHOUT PAROLE IS AN EXCESSIVE PUNISHMENT WHEN IMPOSED UPON A JUVENILE OFFENDER

The consensus against death-in-prison sentences for juvenile offenders confirms the wisdom of the Court's judgment in *Graham*: Human beings, including medical experts, are incapable "of distinguishing [] between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose

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scheme enacted in Florida's post-*Miller* statute would serve as the remedy. *Falcon v. State*, No. SC13-865, 2015 WL 1239365, *8-9 (Fla. Mar. 19, 2015); *see also Horsley v. State*, 160 So. 3d 393, 405-06, 408 (Fla. 2015).

[32] According to 2010 U.S. Census figures, 27,119,391 of the nation's 308,745,538 people live in Pennsylvania, Louisiana and Michigan. U.S. Census Bureau, *Population Distribution and Change: 2000 to 2010*, 2010 Census Briefs, Table 1 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf.

crime reflects irreparable corruption." 132 S.Ct. at 2469 (internal quotation omitted). Thus, a life without parole sentence, "the second most severe permitted by law," *id.* at 69 quoting *Harmelin v. Michigan*, 501 U.S. 957 (1991) (opinion of Kennedy, J.), is "disproportionate" where "that judgment [is] made at the outset." 560 U.S. at 69, 73.

The lynchpin of the *Graham* logic is that juvenile offenders possess not only "diminished culpability," but also "heightened capacity for change." *See Miller*, 132 S.Ct. at 2469. Though the characteristics of youth "often result in impetuous and ill-considered actions and decisions," *Graham*, 560 U.S. at 69, "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." *Id.* at 79. For these reasons, "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Id.* at 73.

Indeed, when forced by courts to reconsider whether JLWOP is an appropriate punishment for a particular now-adult juvenile offender, often prosecutors themselves concede that, in retrospect, it is not. For example, after this Court granted certiorari in *Toca v. Louisiana*,[33] the Orleans Parish District Attorney's Office agreed to a new plea bargain in which Mr. Toca's murder conviction was

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[33] On December 12, 2014, the U.S. Supreme Court granted certiorari in *Toca v. Louisiana*, 135 S. Ct. 781 (2014), to decide whether *Miller* was retroactive. On February 3, 2015, the Court dismissed the case by agreement of the parties. *See Toca v. Louisiana*, 135 S. Ct. 1197 (2015).

vacated and he was released from prison.[34] In other words: in 2014, Louisiana prosecutors argued that Mr. Toca should remain incarcerated for life and not even be eligible to present a case for his release to the parole board; just months later, those same prosecutors explained that Mr. Toca was "no longer a public safety risk"[35] and consented to his immediate release. Notably, in the short time since his release, Mr. Toca, a man who was once sentenced to die in prison, has begun to construct a useful life for himself, getting a job and starting a small business.[36]

Barring juvenile life without parole would neither prompt nor guarantee the release of any inmate. It might be that a significant number of juveniles do not transform their lives in the same way that Mr. Toca appears to have done. But the point is not that no juvenile who commits a homicide

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[34] Lyle Denniston, *Louisiana Inmate in Key Case to be Freed*, SCOTUSblog (Jan. 29, 2015, 6:03PM), http://www.scotusblog.com/2015/01/louisiana-inmate-in-key-case-to-be-freed/; John Simerman, *George Toca, La. Inmate at Center of Debate on Juvenile Life Sentences, to go Free*, New Orleans Advocate, Jan. 30, 2015, http://www.the neworleans advocate.com/news/11462053-123/george-toca-louisiana-inmate-at.

[35] Helen Freund, *Imprisoned for 30 Years, Angola Inmate to be Released After New Orleans DA Cuts Deal*, Times-Picayune, Jan. 29, 2015, http://www.nola.com/crime/index.ssf/2015/01/imprisoned_for_30_years_angola_inmate_to_be_released_after_new_orleans_da_vacates_sentence.html.

[36] John Simerman, *Free After Three Decades in Prison, George Toca Sprints Toward a New Life*, New Orleans Advocate, Mar. 19, 2015, http://www.theneworleansadvocate.com/news/11828559-148/free-after-three-decades-in.

offense is culpable enough to warrant permanent imprisonment. Instead, a categorical bar against an initial determination of incorrigibility simply recognizes our collective inability to with "sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Graham*, 560 U.S. at 77. All that such a ruling would require, as *Graham* did, is that juvenile offenders receive a sentence that provides them some meaningful opportunity at a later date to make the case that they should be released. In other words, such a ruling would provide the possibility of release—not a guarantee.[37]

Mr. Montgomery's case illustrates the insufficiency of a single incorrigibility determination. If *Miller* had been decided before Montgomery's trial, the judge could have considered factors that mitigated Montgomery's culpability; for example: The homicide did not happen as the result of careful planning and deliberation, but rather Montgomery "shot in panic as the officer confronted him playing hooky." Pet. Br. 6. Moreover, Montgomery possessed functional deficits that exceeded the ordinary characteristics of youth; including "borderline" intellectual functioning (an IQ "somewhere in the

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[37] In the past few years, states have already shown that they can balance effectually the need for fairness to offenders who have spent significant amounts of time in prison with public safety concerns. *See, e.g.*, Marisa Gerber, *California inmate's parole reflects rethinking of life terms for youths*, LA TIMES (Mar. 24, 2015) (noting that "three levels of review — a resentencing hearing, a parole hearing and the governor's chance to weigh in — provides sufficient 'levels of safeguards to ensure that public safety is protected'").

70's"), 'inability to plan ahead, little foresight, low self control, low self discipline, and very little ability to make judgments.'" Pet. Br. 6. But even the most prescient judge could not have known that Montgomery, "[e]ven without hope of release, [] has served as a coach and trainer for a boxing team he helped establish, has worked in the prison's silkscreen department, and strives to be a positive role model and counselor for other inmates." Pet. Br. 7.

Mr. Montgomery is one example of a broader principle that goes to the heart of why juvenile life without parole is an excessive punishment: people change, sometimes profoundly. Thus, *Miller*'s shortcoming is that it forces a once-and-for-all finding of incorrigibility even though the best evidence to make that judgment is unavailable for years—or even decades—after the original sentencing determination.

III. A CATEGORICAL BAR IS THE MOST STRAIGHTFORWARD WAY TO RESOLVE THIS CASE

The Nation has abandoned juvenile life without parole. The direction of change is unmistakable, the pace of change is remarkable, and the extravagance of the punishment is sufficient to trigger Eighth Amendment protection. Like the analogous holdings in *Atkins*, *Simmons*, and *Graham*, a categorical ban on juvenile life without parole would obviate the need to resolve the retroactivity problem because every offender currently under the sentence would receive relief. *See, e.g.*, *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (noting that a new rule is substantive and therefore

retroactive if it "'prohibit[s] a certain category of punishment for a class of defendants because of their status or offense'") (internal citations omitted).

Moreover, though addressing the propriety of a new constitutional rule is not normally an act of judicial modesty; here, deciding the jurisdictional question is no less immodest because it implicates "fundamental issues" such as the Court's "role under the Constitution as the final arbiter of federal law, both as to its meaning and its reach, and the accompanying duty to ensure the uniformity of that federal law." *See, e.g.*, *Danforth v. Minnesota*, 552 U.S. 264, 310 (2008) (Roberts, C.J., dissenting).

For all of these reasons, and most importantly because a mature consensus against juvenile life without parole has developed, this Court should request supplemental briefing on the Eighth Amendment question.

CONCLUSION

Amici take no position on whether the Court has jurisdiction to decide the *Miller* retroactivity question, or on the outcome of the retroactivity question itself. Given the national turn away from juvenile life without parole, we simply urge the Court to invite supplemental briefing on whether the Eighth Amendment bars the imposition of a life without parole sentence upon a juvenile offender.

Respectfully submitted,

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